

## **Prior Substantiation Doctrine: Why Post-Soviet (Russian) approach and US Policy Statement regarding Advertising Substantiation have similar external standards?**

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### **Abstract**

An advertisement provides the flow of commercial information from manufacturers to consumers and consequently effects on consumer choices regarding products. Therefore, each manufacturer tries to persuade consumers on certain product characteristics, but the persuasive information can become deceptive when manufacturer attempts to manipulate consumers. Since deception creates unfair advantages for its distributor and misleads consumers by affecting their purchasing decision, the government has to regulate misleading advertising by setting legal standards concerning deception. Deception standard was originated in the USA and has been implemented in other legal systems. The EU competition law developed the legal framework for misleading advertising under the influence of US antitrust law. Russia, on the other hand, attempted to implement the EU legal concept, but unfortunately it designed very a general and ambiguous legal framework for misleading advertising, or so-called improper advertising. Furthermore, the concept of improper advertising contains non-content regulation such as violation on times, place and manner of advertising in order to control excessive amounts of advertising. Here, the substantiation standard means that advertisers must prove their advertising claims with relevant documents or with appropriate, competent and reliable scientific evidence. Through this substantiation or prior substantiation standard, the enforcement authority wants to provide its administrative interest to keep control over advertising.

**Keywords:** Commercial Speech Doctrine, Misleading Advertising, Deception Standard, Non-content Regulation, Unreliable Advertising, Prior Substantiation Doctrine

## I. Introduction

The main theory of advertising regulation based on Commercial Speech Doctrine, that is the doctrine developed by the US Supreme Court to protect commercial speech under the First Amendments of the US Constitution (*Va. Pharmacy Bd. v. Va. Consumer Council*, 1976), (*Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 1980). Accordingly, the commercial speech doctrine determined three main questions to regulate misleading advertising: (1) How much regulation is permissible? (2) How should government protect competitors and consumers from misleading advertising? (3) What method of regulation can be applied towards misleading advertising? To answer these questions the US Supreme Court developed an Integrated Model of Restriction of Commercial Speech. The model concluded that the regulation of misleading advertising should be less strict, direct, and content-based [1].

Less strict regulation connotes that even misleading advertising does not enjoy constitutional regulation; it should not be totally banned. Indeed, strict regulatory policy towards misleading advertising can suppress true information. Direct regulation means that regulation should be directed to identify and eliminate deceptive statements from commercial messages [2]. Finally, content-based regulation should be applied towards misleading advertising because deceptive messages in advertisement are determined by textual analysis of its context. Non-content regulation is a method of advertising regulation, which is conducted by restrictions on time, place and manner of advertising in order to control excessive amounts of advertising [3]. The substantiation standard means that advertisers must

prove their advertising claims with relevant documents or with appropriate, competent and reliable scientific evidence [4].

Content-based regulation focuses on deception standard, which was originated in the USA and has been implemented in other legal systems. US antitrust law introduced the legal concept of misleading advertising under unfair methods of competition and deceptive practices in commerce [5]. The Federal Trade Commission Act (FTC Act) declared dissemination of false advertisements as unlawful; however the legal provision limits legal requirements by stating only materiality requirement (Federal Trade Commission Act, 2013). Accordingly, false advertisement is an advertisement which is misleading in a material respect (§55 a). The materiality here refers to misrepresentation that likely to directly or indirectly induces the purchase by affecting upon commerce (§52a) (Carson, 2010). A more comprehensive legal concept of misleading advertising was introduced by the Lanham Act (§43a) (Lanham Act, 1946), and its legal requirements were developed by the Skil case (Skil Corporation v. Rockwell International Corp., 1974).

In Skil Corporation v. Rockwell International Corporation, the US District Court for the Northern District of Illinois clarified two main legal requirements for misleading advertising under Section 43(a) of the Lanham Act. First, deceptiveness, which describes that advertisements should actually deceive or have the tendency to deceive a substantial segment of their audience, and secondly, materiality, which means that deception is material, in that it is likely to influence the purchasing decision (Skil Corporation v. Rockwell International Corp., 1974). The EU competition law developed the legal framework for misleading advertising under the influence of US antitrust law [6]. In particular, the EU Directive concerning Misleading and Comparative Advertising specifies misleading

advertising as representation which deceives or is likely deceive consumers and is likely to affect to their economic behavior [7].

The analysis made above shows that the EU Directive follows common legal requirements such as deceptiveness and materiality like the US law. Russia, on the other hand, attempted to implement the EU legal concept, but unfortunately it designed very a general and ambiguous legal framework for misleading advertising, or so-called improper advertising [8]. The first version of Russian Advertising law, which was affected by the EU law, defined improper advertising as unfair, unreliable, or false advertising, which violates the requirements on content, time, place and manner of advertising (Federal law on Advertising, No. 108-FZ (Russian Federation, 18.07.1995), 2023). This definition shows that Russian legislature implemented non-content regulation as well, which intends to control amounts of advertising [9]. The current Russian Advertising law defines improper advertising as any violation of advertising law (Federal law on Advertising, No. 38-FZ (Russian Federation, 13.03.2006), 2023).

However, unlike the US and EU models, the Russian legal concept of improper advertising includes the deception standard, but not deceptiveness (Federal law on Advertising, No. 38-FZ (Russian Federation, 13.03.2006), 2023). Furthermore, the concept of improper advertising also contains non-content regulation such as violation on times, place and manner of advertising that makes the enforcement vague. Similarly, the Commonwealth of Independent States (the CIS) determines improper advertising according to the Russian model [10]. The CIS Agreement on Collaboration in the Field of Advertising Regulation (Moscow, 2003) not just defines improper advertising at the regional level, but also requires the harmonization of legal provisions in national legislations of member-states

(The Main Provisions of the Agreement on Collaboration of States - Participants of the CIS in the Field of Advertising Regulation, 2005).

## II. Methods

The research conducts a comparative analysis on the USA and Russia. The comparative research starts with the USA, because fundamental theories and legal concepts were developed in the USA. The analysis on development roots shows that legal standards transplanted from the USA to Europe, from Europe to Russia and from Russia to Uzbekistan (the USA-the EU-Russia-Uzbekistan). Since the Uzbek legislature implemented laws directly from Russia, the Russian Federation is also a subject for comparative analysis in the research. The study focuses on Russia because the Russian law has had a significant impact on the development of legal requirements in Uzbekistan [11].

The research does not intend to conduct special analysis on the EU, because legal regulation varies from country to country within the EU that requires separate research. The research is conducted in an intersection of the fields competition law, consumer protection law and advertising law, because misleading advertising, as an unfair competition method (unfair trade practices), is directly addressed to consumers who need to be protected. Moreover necessity for examination of legal standards requires analyzing special provisions of the Advertising law. However, the research does not cover intellectual property related issues of misleading advertising, because IP law has own specific legal nature with the broad scale and problematic issues that needs a separate study [12].

## III. Results

Most of the CIS member states introduced and developed EU competition law without sufficient understanding of what misleading advertising entails and

what the advertisement role in the economy should be (Interstate Council for Antimonopoly Policy: Results of Activities and Tasks for the Future, 2016). Moreover, the CIS approach on designing legal definition was kind of quick-fix for the problems, and therefore has had notable effects on legal components of misleading advertising [13]. In particular, the legislature of the CIS member states designed the regulative standards for misleading advertising as a mixture of content-based and non-content based standards. Furthermore, the content-based standard was elaborated without the materiality element related to consumer behavior, and most importantly, the non-content based regulation has been applied in practice as a priority standard [14].

Uzbekistan also implemented the Russian (CIS) model of improper advertising, but tried to add the EU model without understanding the nature of legal requirements for misleading advertising and without predicting the economic, social and legal entails of this concept (Richards) As a consequence, the Uzbek legislature designed a mixed legal concept of improper advertising, which includes deceptiveness from the EU model and non-content regulatory standard from the Russian model (Law on Advertising of the Republic of Uzbekistan, 1998). These unclear and non-deception legal concepts make the regulation ambiguous and ineffective. In particular, Article 13 of the Advertising law of Uzbekistan defines misleading advertising as improper advertising, which, along with the deception standard, has standards unrelated to deception as well [15].

The non-deception standards refer to non-content regulation and substantiation standard that aim to control amount of advertisement rather than to find and evaluate deception in advertisement. This ambiguous legal framework of improper advertising gives an opportunity to the government to intervene in free commercial speech of entrepreneurs in an administrative way [16]. As a result, the

government unreasonably punishes trader for non-deceptive actions and limits the free flow of commercial information. Consequently, consumers cannot access the information about products and services that they need and they lose confidence. While the government is anxious and busy with this non-deceptive standard, unfair competitors use misleading advertising as a tool to manipulate consumers [17].

#### **IV. Discussion**

##### **A. Way to prove advertising information in the Russian Federation**

Russian Advertising law determines unsubstantiated information in advertising as unreliable advertising. The first Advertising law requires advertisers to show their license number and the organization that issued it if the activity of the advertiser is subject to licensing or the advertised product is subject to certification. The reason for adoption such legal provision is that the advertising of financial (banking) services without showing a license number occurred frequently at that time [18]. For instance, in 2005, the Stavropol branch of Impexbank placed an outdoor advertisement with a proposal to provide loans to small businesses by indicating in advertisements the symbols of world currencies such as the US Dollar and Euro. This advertising misled consumers about the service being advertised, since it created the impression that Impexbank provides loans to small businesses in the mentioned currencies [19].

Interestingly, the FAS evaluated this advertising as unreliable since the advertisement did not indicate information about their license. The majority of violation cases of license requirements in advertising are cases related with pharmaceuticals, food supplements and medical clinic advertising. Recent national cases in Russia are related to the advertising of white magicians or witches. Such untraditional services are not prohibited in Russia, and accordingly its advertisement is also permitted [20]. However, regulation of such advertisements

is difficult due to the absence of some legislative requirements directed to control them [21]. The Duma and the Presidium of the Supreme Arbitration Court of the Russian Federation cannot do anything about this issue (Review of the Practice on Consideration of Disputes concerning the Advertising Law Application, 2023).

Thereby, the way for legal regulation of the content of advertising information should not be only a license requirement, but also the nature of the activity being carried out, since licensing is not the main tool to protect consumers from unreliable advertising. The next issue of advertisement substantiation is the requirement on proving advertising information with relevant documents. The enforcement body considers the advertisement without relevant documents to be unreliable [22]. For instance, the newspaper "Extra-Business" (No. 5-664 from February 10, 2007) published the advertisement of the residential complex co-called white sail. The advertisement indicated that a project declaration for above-mentioned real estate was available on the website [www.drujba.biz](http://www.drujba.biz). After checking this link, the territorial department Stavropol of the FAS found that a project declaration did not exist. The department considered the printed advertisement to be unreliable and sent a cease and desist order to the construction company Drujba [23].

### **B. Russian approach on Prior substantiation doctrine**

The Advertising law should facilitate consumers' expectations regarding the reliability of advertising claims, because consumers rely on the proof of facts mentioned in an advertisement to make proper decisions concerning an advertised product or service. However, numerous facts of advertising distribution without its proper justification are evidence that some advertisers start their promotions without necessary evidence of the statement about advertised product. There are at least two possible explanations for this behavior [24]. First, some advertisers



assume that their advertising is reliable, and they will be able to provide evidence during investigation. Second, advertisers recognize that their advertising statements are not reliable, but they hope their advertising will not be questioned, and will not be checked either in administrative or judicial proceedings [25].

There are three possible approaches concerning the substantiation doctrine to determine the moment when the justification of advertising claims should be physically submitted for consideration to the relevant enforcement agency. First, legislature can require advertisers to provide written proof for advertising claims before dissemination. Second, legislatures can oblige advertisers to substantiate advertising statements at a time when the administrative authority or court cast doubts on reliability of advertising [26]. Third, in the system of pre-control of advertising, an advertiser is obliged to submit justification of advertising claims before dissemination. In this so-called "advertising censorship", an advertisement cannot be distributed before being granted permission [27].

The first approach has been implemented in US administrative law which is called the prior substantiation doctrine. The Russia adopted a second approach. The Russian scholar Kislitsin conditionally named it the "on demand substantiation doctrine" (Kislitsyn, 2006). According to this scholar, in comparison with the on demand substantiation doctrine, the prior substantiation doctrine has the following advantages. First, the regulatory process takes less time and it is less costly for the enforcement body in terms of effort and resources. In case of failure to provide substantiation for advertising statements, there is no need to consider the case on its merits. Second, as for the high preventive effect of the doctrine, the advertisers' obligations to substantiate advertising before dissemination, of course, lowers the percentage of unreliable advertising on the market [28].

### **C. Prior Substantiation Doctrine in the USA**

Recent discussions in misleading advertising regulation centered on "Prior Substantiation Doctrine", which requires advertisers (defendants) to substantiate a claim pursuant to certain FTC standards. According to the Policy Statement Regarding Advertising Substantiation, an advertiser must have had or provide with documents and information in the form of "competent and reliable scientific evidence" for its advertising claims before they are disseminated (Swindle, 2003). Specifically, the US courts refuse to apply "prior substantiation doctrine" in private class action, because plaintiffs allege that unsubstantiated advertising claims are false, and therefore plaintiffs want to shift burden of proof onto advertisers (defendants) (Rosenfeld & Blynn, 2011). However, in Fraker and Chavez cases, courts decide that absence of substantiation or scientific evidence in advertising claim does not necessarily mean that advertisement is deceptive [29].

The US courts state that false advertising claims cannot be based upon a lack of substantiation (Fraker v. Bayer Corporation, Justia Dockets & Filings). Moreover, in Franulovic, Pelkey and Precision IBS cases, courts held that the plaintiff must prove falsity, not just a lack of pre-existing substantiation (Franulovic v. Coca Cola Co, 2010), (Precision Ibc, Inc. v. PCM Capital, LLC). The reason for the courts approach is that plaintiffs typically paint the FTC and FDA (Food and Drug Agency) documents as containing legal "conclusions" and "findings" of substantiation which, in turn, are sufficient to state a claim for false advertising. Thus, the US courts decide that the FTC can sue an advertiser for making substantiated advertising claim, but a private plaintiff cannot. The US courts want to say that external factors have been appeared in the advertising regulation practice. In particular, the case analysis shows that external factors such as substantiation standard has started to effect on misleading advertising regulation in the USA [30].

## Conclusion

Russia designed a very general and ambiguous legal framework for misleading advertising, or so-called improper advertising. The concept of improper advertising contains non-content regulation such as violation on times, place and manner of advertising in order to control excessive amounts of advertising. The Commonwealth of Independent States (the CIS) determines improper advertising according to the Russian model. Here, Prior Substantiation Standard for misleading advertising regulation spread from Russia to the CIS countries. Russian Advertising law determines unsubstantiated information in advertising as unreliable advertising. The first Advertising law requires advertisers to show their license number and the organization that issued it if the activity of the advertiser is subject to licensing or the advertised product is subject to certification. The next issue of advertisement substantiation is the requirement on proving advertising information with relevant documents. The enforcement body considers the advertisement without relevant documents to be unreliable.

However, the enforcement authority is unwilling to exclude non-deception elements from deception standard because their existence in the legal framework provides administrative interest to keep control over advertising. Moreover, the ambiguous legal framework of improper advertising gives the enforcement agency an opportunity to unreasonably intervene into the commercial speech of entrepreneurs. This situation causes an imbalance of interests in the advertising market. In fact, the government interest to control commercial information flow has become superior to that of competitor and consumer interests. Hence, the main principle of the commercial speech doctrine on the limitation of government intervention does not work in practice. Based on these findings, the research suggests making the deception concept clearer by separating the deception

standard from existing non-deception elements so that the enforcement authority will be able to use deception standard more actively in practice. From a theoretical perspective, the research proposal requires a comprehensive approach that takes into account not only providing a balance of competing interests, but also negative impacts of non-deception elements in misleading advertising regulation. The proposal is applicable not only to Uzbekistan, but also to Russia and other CIS countries.

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